APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

No. 5730

UNITED STATES OF AMERICA,

Plaintiff.

v.

EDGAR F. SMITH,

Defendant.

This cause is now before the court upon defendant's motion to dismiss the indictment therein pending against him, and, alternatively, for other relief. The necessity for dismissal is alleged to arise from the chronology of procedural events as follows:

On February 21, 1958, a complaint was filed by George W. Kienzler, a special agent of the Internal Revenue Service before the United States Commissioner, charging defendant with unlawfully and wilfully attempting to evade and defeat income taxes due and owing by him to the United States for the taxable year 1951. A warrant was issued for defendant's arrest. On February 24, 1958, defendant was arrested in Springfield, Illinois, and taken before the Commissioner by Deputy United States Marshal, Gilbert Scheller.[1] The record of proceedings before the Commissioner recites that defendant then and there waived his right to a preliminary hearing and was released on bond in the amount of $5,000.00 as fixed by the Commissioner.

Thereafter, on July 8, 1958, an indictment in three counts was returned and filed against defendant charging a violation of Section 145(b) of the Internal Revenue Code.

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[1] Now United States Marshal for the Southern District of Illinois.

Count One, in substance, charged that defendant had filed a false and fraudulent income tax return for the calendar year 1951, and had, thereby attempted to defeat and evade a part of the income tax due and owing by him for that year. Counts Two and Three stated similar charges, alleging a like offense with respect to the filing of defendant's returns for the taxable years of 1952 and 1953, respectively.

On July 28, 1958, defendant moved to dismiss the indictment *inter alia*, upon the ground that the charge made with respect to the 1951 return was barred by the statute of limitations. Defendant's first amended motion to dismiss was filed on January 15, 1959, which renewed the statute of limitations ground and, *inter alia*, averred that defendant was denied the right of counsel and a preliminary hearing before the Commissioner in the proceedings of February 24, 1958. On July 30, 1959, defendant's second amended motion to dismiss was filed, averring that the Commissioner did not have probable cause for issuing the warrant for defendant's arrest and that the Commissioner had denied to defendant the right to counsel and had, by his actions and words, coerced defendant into waiving his right to a preliminary hearing. The latter motion was followed by defendant's third amended motion to dismiss, filed October 15, 1959, averring that the Commissioner had arbitrarily denied to defendant rights accorded to him by Rules 5(b) and (c), Fed. R. Crim. P., 18 U.S.C.A., thereby depriving defendant of due process of law. Each of those motions is still pending, unresolved, and neither is now before the court for decision.

The cause was assigned to Judge Omer Poos for trial. Because of divers continuances of the hearing set upon defendant's motions, a hearing was not reached until September 4, 1959, subsequent to the filing of the second amended motion, but prior to the filing of the third.

The second amended motion was supported by affidavits of defendant and one Wilbur W. Freitag. Those affidavits,

in substance, state that the Commissioner, on February 24, 1958, had refused to fix preliminary bond and continue the preliminary hearing to permit defendant to consult with counsel and had refused to release defendant on bail until he had waived a preliminary hearing.

The argument of counsel for defendant at the September 4th hearing was based upon the statements of the above affidavits. Thereafter, the government called Mr. Kienzler to testify, in substance, as to facts forming the predicative basis for probably cause for issuance of the arrest warrant. At the conclusion of the hearing, Judge Poos directed the parties to file briefs and took the motion under advisement. While the motion was still under advisement, the third amended motion to dismiss was filed as hereinabove related.

Shortly after the September 4th hearing, Mr. Scheller advised Judge Poos, in Chambers, that he had attended the preliminary hearings, that he had observed and heard all proceedings at that hearing and that the facts as stated in the affidavits of defendant and Freitag were untrue. After receipt of that information, Judge Poos, on his own motion, notified the parties that a hearing in the cause would be held on May 6, 1960, at which time additional evidence would be heard. Subsequently, that hearing was continued to June 1, 1960. At the outset of the hearing on June 1st, Judge Poos stated in open court: "* * * shortly after [the September 4th hearing] the Deputy Marshal who was present at the hearing before the Commissioner came in and told the Court the facts and circumstances surrounding the hearing. So after I heard that, I ordered that the parties be notified so that the Court could have this testimony in the record."

Thereupon, Judge Poos asked the United States Attorney to examine Mr. Scheller, under oath, as to the factual situation and circumstances surrounding the hearing before the Commissioner. The hearing and colloquy which then fol-

lowed, led to a continuance of the hearing until July 1, 1960, to enable defendant's attorneys to formulate their position and to determine whether they would adduce further evidence and testimony in response to the anticipated testimony of Mr. Scheller. Also, during the course of that hearing and colloquy, the United States Attorney stated that he would file an affidavit of Mr. Scheller stating his knowledge of facts and circumstances attending the hearing before the Commissioner.

On June 28, 1960, defendant filed the motion which is now before the court for decision. That motion sets forth the facts previously related regarding the conversation of Mr. Scheller with Judge Poos in Chambers, and alleging that Judge Poos had assumed an investigative role in the cause and had heard testimony out of the presence of the defendant, all of which is alleged to constitute a denial of due process of law. That motion further, alleges that the United States Marshal sought to and did improperly approach and influence the court against the defendant. Alternative relief, to which I will subsequently elude, is prayed, but the principal prayer of the motion is that the indictment be dismissed.

After an extended hearing on July 1, 1960, Judge Poos, on his own motion and without ruling upon any of the matters then pending, disqualified himself from presiding further in the cause and the case was reassigned. On February 17, 1961, the last-mentioned motion to dismiss the the indictment was heard and taken under advisement. That motion is the only matter which is now before the court for decision.

Defendant here contends that the conversation between Mr. Scheller and Judge Poos was a denial of due process of law to the defendant. He argues that the Judge, in listening to the statement made in chambers by the Deputy Marshal, and, on his own motion, directing that an additional hearing be held in the cause at which the Marshal

would be sworn and his testimony made a matter of record, assumed an investigative and prosecutive function inconsistent with his judicial role. He argues further that the Marshal, as an officer of the United States, is charged with a duty to protect the constitutional rights of persons accused of crime and that the Marshal violated that duty by approaching the trial judge, *ex parte* and *in camera*, to impart to the Judge information relating to a matter than under advisement. The argument culminates in an assertion that a constitutional infirmity, once attached to the case of the defendant in proceedings preliminary to the actual trial, cannot be cured by the trial judge disqualifying himself; that the question here presented is not one of prejudice to this defendant, but is solely a question of vindicating the Constitution and that constitutional processes can be vindicated under such circumstances only by an order dismissing the indictment. For that major premise, defendant seeks to find an analogy in the line of decisions suppressing evidence which has been illegally obtained.

Defendant's argument, though a novel one, is untenable and unsound. There is no reason for the court now to inquire whether the facts of record related to the Marshal's disclosure to Judge Poos of his version of the facts and circumstances attending the hearing before the Commissioner constituted, at the outset, a denial of constitutional rights. Whatever may be the legal effect of those facts initially, in my opinion the questions thereby presented have now become moot. It is impossible to read the transcript of prior proceedings in this case without the firmly fixed knowledge that Judge Poos acted with admirable candor and with complete impartiality to both parties by calling to their attention the information which had come to his knowledge after the initial hearing upon defendant's second amended motion to dismiss. The transcript further reflects that the same complete candor and impartiality epitomized the proceedings of July 1, 1960, in which, when it appeared from those circumstances that he might be subject to the con-

tention of partiality, Judge Poos expressly declined to rule upon any of the pending motions and disqualified himself from all further participation in the case.

Whatever the effect of the circumstances hereinabove related, any prejudice to defendant is abated by Judge Poos' action in disqualifying himself. If any denial of constitutional rights then prevaded the proceedings, such violation was then abated unless we are first to attribute bias to Judge Poos, and then assume that the same bias attached to any other judge to whom the case might be assigned. Vindication of constitutional processes have never, to my knowledge, been construed to require such an absurd assumption, and the cases upon which defendant principally relies do not support such a result. E.g. *Elkins v. United States*, 364 U.S. 206; *Benanti* v. *United States*, 355 U.S. 96; *Mallory* v. *United States*, 354 U.S. 449; *Kremen* v. *United States*, 353 U.S. 346.

Defendant asserts that the cited decisions, among others, rest upon a judicially established principle that an accused person must be set free whenever a violation of constitutional rights has attended his trial and conviction. That assertion is wholly untenable. It is true that evidence obtained by an illegal search and seizure, e.g., *Elkins* v. *United States*, *supra*, *Kremen* v. *United States*, *supra*, a confession obtained while an accused person is held illegally, e.g., *Mallory* v. *United States*, *supra*, or evidence obtained by wiretapping, e.g., *Benanti* v. *United States*, *supra*, is suppressed, because the Supreme Court has determined that suppression of such illegally obtained evidence is the most effective means for assuring respect for the constitutional and legal rights of the individual to be secure in his person and his home from illegal invasion by law enforcement officers. The result of the decision in each case, however, is a remandment of the case for further proceedings not affected by the use of illegally obtained evidence. Suppression of the illegally obtained evidence would lead to

"setting the accused free" only if use of the suppressed evidence is necessary to a conviction.

The prayer of the motion for dismissal of the indictment is, accordingly, denied.

Alternatively, defendant prays that the notice of hearing, issued *sua sponte* by Judge Poos, be quashed, that the affidavit of Mr. Scheller be stricken and that Mr. Scheller be disqualified as a witness in this cause.

I consider it unnecessary to now rule upon the prayer that the notice of hearing be quashed. By disqualifying himself, Judge Poos concluded, without reaching any decision, all prior proceedings upon defendant's divers motions to dismiss. At that point, the hearings had and the hearings ordered were at an end, and new hearings will now be set and conducted in due course.

The alternative prayer to strike the affidavit of Mr. Scheller and to disqualify him as a witness in this case will be denied. The court does not condone Mr. Scheller's action in imparting information relating to a matter under advisement to the court *ex parte* and *in camera*. However, if Mr. Scheller's act had any tendency to prejudice defendant's rights by influencing the court in its decision upon the issues pending when the information was disclosed *in camera*, that tendency was dispelled when the Judge to whom the disclosure was made disqualified himself from further participation in the case. Should Mr. Scheller testify as to that information at a subsequent hearing in the case, the prior action in injecting his testimony into a pending judicial matter by an *in camera* conference would, I think, affect only the weight of his testimony, not his testimonial competency. Nor should that circumstances affect the right of the government to call him as a witness.

Again, defendant seeks an analogy on the facts of this case to the search and seizure and related cases. He argues that evidence obtained by an illegal search and seizure must

be suppressed, and, *ergo*, evidence related to a court *in camera* must likewise be suppressed.

That attempted analogy overlooks one distinction which I think must be drawn. In the search and seizure cases, and the confession cases, the evidence which is suppressed is evidence obtained from the accused person himself by unlawful or unconstitutional means. The parallel wiretapping cases turn upon the policy of protecting the privacy of the individual from invasion by unlawful means.

The principle followed in each category of cases is geared to the protection of the right of the individual to be secure in his person, privacy and home from unlawful infringement. To secure that protection, the government is denied the fruits of unlawful invasions of those rights.

The reason for applying the exclusionary principle does not exist in this case. Here the evidence sought to be suppressed is testimonial evidence which came to the knowledge of the witness through his personal observations and by the circumstance of his being present at a hearing before a United States Commissioner. It is not even alleged that the evidence was obtained through a violation of defendant's rights. Absent such a violation, the rational of the exclusionary principle as articulated in the *Elkins* case, among many others, has no application to the question now before the court. The legal character of evidence is not destroyed merely by the fact that a potential witness has disclosed in an indiscreet or unlawful manner that he has knowledge relevant to an issue in litigation. If the exclusionary rule were to be applied to the circumstances disclosed by this record, then every human error by a federal official which remotely related to testimonial evidence would lead to the suppression of the evidence to which it relates.

Because of Judge Poos' order disqualifying himself, a hearing *de novo* must be had upon the motions to which Mr. Scheller's testimony would be relevant. Due process of law is satisfied when defendant is accorded a fair hearing be-

fore an unbiased tribunal. A new hearing upon the motions to dismiss will accomplish that result.

For the reasons hereinabove set forth, the motion to dismiss the indictment and for alternate relief is denied.

DATED this 2nd day of May, 1961.

FREDERICK O. MERCER
United States District Judge

APPENDIX B

Oral Rulings of Judge Mercer in Proceedings on July 26, 1962

[Mr. Ratner] We do, if Your Honor please, would like to have the opportunity, pray for the opportunity to cross examine Mr. Scheller concerning his testimony, and we do request the opportunity to have the Defendant and Mr. Freitag take the stand and testify in support of their version of the events which transpired. We think that a fair hearing requires that, and I will say nothing further, Your Honor, because I feel that I have gone as far as my duty as an attorney permits me to go in making the point, that Your Honor's statement that you will credit Mr. Scheller's version as between the version of Scheller and the Defendant and Freitag is not compatible with due process as I understand it.

The Court: Well, I will pass on your last motion right now, I'm not going to open this proceedings for further testimony by Mr. Scheller or by Mr. Smith or by Mr. Freitag. The presumption is that they have said in their affidavits what they would say in testimony, and I'm not going to open the door for any further testimony. I'm going to take the record as I have it.

* * *

[The Court] Gentlemen, I'm going to pass on all of these motions at this time. I feel that I'm not passing on

the matter without full information as to the arguments made by the defendant and the government. As you know, I've had the occasion to study this file in the past, I've written an opinion dealing with another phase of this matter, which to some degree is tied in with the pending motions, so I'm not ignoring the arguments and I have given the matter consideration, and I do not feel that there's any necessity to take this matter under advisement, and for that reason I'm going to pass upon all these motions.

I'm passing on the motion for bill of particulars, and denying the motion. In line, in view of a long line of cases, which simply holds that the Government is under no duty to allow a bill of particulars, except under rather extraordinary circumstances and conditions, which I do not find exist in this case.

Now fundamentally we get down to this proposition of what happened at a preliminary hearing for the defendant, Edgar Smith. There isn't any question at all but what this defendant was entitled to a preliminary hearing, but I conclude after judging of the credibility of the witnesses that I have by way of affidavit, I conclude that Mr. Smith did have a proper preliminary hearing.

Now I don't suppose there's ever been a perfect preliminary hearing, indeed there's never been a perfect proceeding in any Court that I know about, but as I studied what happened, it seems to me that the Commissioner was very earnest in his desire to protect the interests of Mr. Smith. There isn't any evidence that Mr. Smith was a babe in the woods. There isn't any evidence that he was one of those unfortunate creatures of society that had a mentality whereby he didn't know what was going on. There wasn't any force or compulsion upon this gentleman at the time of the preliminary hearing, indeed, there was a studied effort on the part of the Commissioner that he be represented by an attorney of his own choice.

Now I simply hold that this Rule 5 B and C was fully complied with, and that the preliminary hearing was in

compliance with all of the rules of procedure, and simply hold that due process was not denied, and that this defendant was not and has not been prejudiced in any degree by any errors or omissions in the preliminary hearing to the extent that it would justify the dismissal of these indictments.

There's a presumption that you gentlemen know obtains that every officer is presumed to do his duty, that doesn't always happen, we have many decisions that demonstrate that it always doesn't happen, but I can't see in this case that we get down to such a fundamental thing that I could dismiss these indictments on the basis that this defendant has not been offered due process.

I'm just as anxious as anybody else to see that every defendant has his constitutional rights protected. I rather deplore the implication that a succeeding judge or judges in this case cannot get away from what has happened heretofore. I ascribe it to the zeal and the earnestness and I would say the sincerity of defendant's attorney, in representing the defendant as he seeks to do in his own particular way. I totally reject any suggestion that this Court or any other judge who might be called upon to hear this case cannot hear it impartially and fairly.

If that were true, the whole wheels of justice would cease turning, there would be no orderly administration of justice, and I simply deny any suggestion that this case be dismissed because of the things that have happened in the preliminary hearing.

There is a speculation indulged in by defendant's attorney as to what a Grand Jury might have done. That's wholly speculative. In my opinion it doesn't go to the very fundamental proposition that defendant's rights must be protected in this and every other Court, that isn't the point at all. This defendant will be accorded every constitutional right that he has, just as every other defendant is accorded their constitutional rights. I simply find that the due process question raised does not exist, that there has been due

process, that upon my determination based upon the credibility of witnesses, I find that the proceedings were proper, and that the indictments, indictments should stand and for these reasons it is ordered by the Court that all of the pending motions are denied, and the matter will be placed upon the next trial calendar of this Court.

I'm unable to state to counsel at this time when that will be, I apprehend it will be in the early fall, and at that time the matter will be set and will be heard.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

November 29, 1962

Before HON. JOHN S. HASTINGS, Chief Judge; HON. ELMER J. SCHNACKENBERG, Circuit Judge; HON. WIN G. KNOCH, Circuit Judge.

No. 13972

In the Matter of the Application of EDGAR F. SMITH for an order in the nature of a writ of mandamus, etc.

Petition for a Writ of Mandamus to Honorable Frederick O. Mercer, Chief Judge of the United States District Court for the Southern District of Illinois

This matter coming on for consideration by the court on the petition of Edgar F. Smith for a writ of mandamus to Honorable Frederick O. Mercer, Chief Judge of the United States District Court for the Southern District of Illinois, requiring him to show cause in this court, at a time to be designated, why he should not vacate and set aside his orders entered May 2, 1961, and July 26, 1962, and grant certain motions of petitioner to dismiss a certain indictment, that a writ of mandamus issue directing him to vacate and set aside said orders and grant the aforesaid motions and petitioner have such additional relief and process as may

be necessary and appropriate in the premises, and the court having examined and considered the matter and being fully advised in the premises and being of the opinion that the facts set forth in the petition do not justify a hearing, IT IS ORDERED that the said petition be and the same is hereby denied.

A True Copy:

Teste:

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

Received Dec. 21, 1962

Tuesday, December 18, 1962

Before HON. JOHN S. HASTINGS, Chief Judge; HON. ELMER J. SCHNACKENBERG, Circuit Judge; HON. WIN G. KNOCH, Circuit Judge.

No. 13972

EDGAR F. SMITH,

Petitioner.

vs.

HONORABLE FREDERICK O. MERCER, Chief Judge of the United States District Court for the Southern District of Illinois,

Respondent.

Petition for Writ of Mandamus

IT IS HEREBY ORDERED that the motion of petitioner for leave to file a reply to the answer in opposition to the motion of petitioner for order vacating and staying notice of

trial pending application for writ of certiorari be granted, and the Clerk of this Court is hereby directed to file instanter the said reply to answer tendered on December 17, 1962.

On consideration of the motion of petitioner for order vacating and staying notice of trial pending application for writ of certiorari to review denial of petition for writ of mandamus, entered November 29, 1962, and motion pursuant to Rule 28 of the Rules of this Court for a stay of mandate upon said judgment and order of November 29, 1962, filed on December 5, 1962; answer in opposition to motion of petitioner for order vacating and staying notice of trial pending application for writ of certiorari to review denial of petition for writ of mandamus and motion for stay of order denying petition, filed on December 11, 1962; and reply to answer in opposition to motion of petitioner for order vacating and staying notice of trial pending application for writ of certiorari to review denial of petition for writ of mandamus and motion for stay of order denying petition, filed on December 17, 1962;

It Is Hereby Ordered that the said motion of petitioner for order vacating and staying notice of trial pending application for writ of certiorari to review denial of petition for writ of mandamus, entered on November 29, 1962, and motion pursuant to Rule 28 of the Rules of this Court for a stay of mandate upon said judgment and order of November 29, 1962, be, and the same are hereby Denied.